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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,
Appellant,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Court of Appeal Second Appellate District, State of California

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BRIEF *AMICI CURIAE* OF AMERICAN INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, THE ALLIANCE OF AMERICAN INSURERS AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

	Page
TABLE OF CASES AND OTHER AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. STATE RETALIATORY TAXES, DESIGNED TO LOWER BARRIERS TO INTERSTATE COMMERCE, WERE CONGRESSIONALLY AUTHORIZED BY THE McCARRAN-FERGUSON ACT AND CONSTITUTIONALLY SUSTAINED BY THIS COURT ONE YEAR LATER	7
A. The McCarran Act Authorized the States to Continue Retaliatory Taxation, Notwithstanding That This Court Had Subjected Insurance to the Commerce Clause for the First Time	7
B. This Court Has Previously Ruled That the McCarran Act Authorized Retaliatory Taxes and That Congress' Authorization Was Within Its Power Under the Commerce Clause	14
C. Because of the States' and Industry's Substantial Reliance, This Court's Past Decisions Should Not Now Be Overruled and Long-Established Systems of Taxation Upset	17
II. STATE RETALIATORY TAXATION OF INSURANCE COMPANIES IS RATIONAL, NOT ARBITRARY, AND THUS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT	17

TABLE OF CONTENTS—Continued

Page

A. The Equal Protection Standard for Measuring a State Tax Classification Is Whether Any State of Facts Reasonably May Be Conceived That Would Justify the Distinction Drawn by the Statute 17

B. State Retaliatory Taxation of Insurance Companies Is Based on the Entirely Rational Premise That This System Tends to Promote Uniformity, Minimize Burdens on the Insurance Business, and Foster Interstate Commerce in Insurance 20

C. Congress Has Enacted Retaliatory Tax Measures Classifying Aliens and Foreign Corporations on the Basis of their Home Countries' Laws, Thus Demonstrating That California's Similar Tax Is Not Irrational.... 23

D. The Constitutionality of Numerous Other State Laws Would Be Called Into Question If This Court Were to Strike Down Retaliatory Taxes 26

E. Equal Protection Does Not Compel Judicial Intrusion Into an Area Where Both Congress and the States Have Validly Exercised Their Legislative Judgment 28

CONCLUSION 30

APPENDIX A Ohio Insurance Tax Provisions 1a

APPENDIX B State Gross Premiums Taxes on Foreign Property and Casualty Insurers.. 3a

APPENDIX C Federal Retaliatory Tax Provisions.... 4a

TABLE OF AUTHORITIES

CASES: Page

Allied Stores of Ohio, Inc. v. *Bowers*, 358 U.S. 522 (1959) 18, 19, 20
Atlantic Insurance Co. v. *State Board of Equalization*, 255 Cal. App. 2d 1, 62 Cal. Rptr. 784 (Ct. App. 1967), *appeal dismissed and cert. denied*, 390 U.S. 529 (1968) 23
Austin v. *New Hampshire*, 420 U.S. 656 (1975) 28
B&L Motor Freight, Inc. v. *Heymann*, 120 N.J. Super. 270, 293 A.2d 711 (N.J. Ch. 1972), *aff'd*, 125 N.J. Super. 372, 311 A.2d 184 (App. Div. 1973) 27
Bolling v. *Sharpe*, 347 U.S. 497 (1954) 25
Bothwell v. *Buckbee, Mears Co.*, 275 U.S. 274 (1927) 8
Bowring v. *Commissioner of Internal Revenue*, 27 B.T.A. 449 (1932) 25
Buckley v. *Valeo*, 424 U.S. 1 (1976) 25
Burnet v. *Chicago Portrait Co.*, 285 U.S. 1 (1932) 25
Carmichael v. *Southern Coal & Coke Co.*, 301 U.S. 495 (1937) 18
Cheney Bros. Co. v. *Massachusetts*, 246 U.S. 147 (1918) 20
Clark Distilling Co. v. *Western Md. Ry. Co.*, 242 U.S. 311 (1917) 15
Clay v. *Dixie Fire Insurance Co.*, 168 Ky. 315, 181 S.W. 1123 (1916) 21
Cloverleaf Butter Co. v. *Patterson*, 315 U.S. 148 (1942) 15
Columbia Fire Insurance Co. v. *Tracy*, 133 N.E.2d 661 (Ohio Ct. Com. Pl. 1953), *aff'd*, 139 N.E.2d 482 (Ct. App. 1954) 2-3
Commonwealth v. *Fireman's Fund Insurance Co.*, 369 Pa. 560, 87 A.2d 255 (1952) 21
Dandridge v. *Williams*, 397 U.S. 471 (1970) 18, 22
Flood v. *Kuhn*, 407 U.S. 258 (1972) 17
Goldsmith v. *Pringle*, 399 F. Supp. 620 (D. Colo. 1975) 27

TABLE OF AUTHORITIES—Continued

	Page
Group Life & Health Insurance Co. v. *Royal Drug Co.*, 440 U.S. 205 (1979)	9, 10
Hampton v. *Mow Sun Wong*, 426 U.S. 88 (1976)	26
Hanover Fire Insurance Co. v. *Harding*, 272 U.S. 494 (1926)	19
Hawkins v. *Moss*, 503 F.2d 1171 (4th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975)	27
Hooper v. *California*, 155 U.S. 648 (1895)	8
Hughes v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976)	19
In re Griffiths, 413 U.S. 717 (1973)	27
In re Insurance Tax Cases, 160 Kan. 300, 161 P.2d 726 (1945), *aff'd per curiam sub nom. Prudential Insurance Co.* v. *Hobbs*, 328 U.S. 822 (1946)	10, 16
International Shoe Co. v. *Washington*, 326 U.S. 310 (1945)	15
Kentucky Whip & Collar Co. v. *Illinois Central R.R. Co.*, 299 U.S. 334 (1937)	15
Lehnhausen v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973)	18
Lewis v. *BT Investment Managers, Inc.*, 100 S. Ct. 2009 (1980)	15
Lincoln National Life Insurance Co. v. *Read*, 325 U.S. 673 (1945)	20
Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911)	18, 22
Madden v. *Kentucky*, 309 U.S. 83 (1940)	18
Mathews v. *Diaz*, 426 U.S. 67 (1976)	25
Metropolitan Casualty Insurance Co. v. *Brownell*, 294 U.S. 580 (1935)	18, 19
New York Life Insurance Co. v. *Cravens*, 178 U.S. 389 (1900)	8
New York Life Insurance Co. v. *Deer Lodge County*, 231 U.S. 495 (1913)	8
Noble v. *Mitchell*, 164 U.S. 367 (1896)	8
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294 (1933)	14

TABLE OF AUTHORITIES—Continued

	Page
Panhandle Eastern Pipe Line Co. v. *Public Service Commission*, 332 U.S. 507 (1947)	15
Paul v. *Virginia*, 75 U.S. (8 Wall.) 168 (1868)	4, 8
Perry v. *Sindermann*, 408 U.S. 593 (1972)	27
Philadelphia Fire Association v. *New York*, 119 U.S. 110 (1886)	8, 13, 21
Phoenix Insurance Co. v. *Welch*, 29 Kan. 672 (1883)	21
Prudential Insurance Co. v. *Benjamin*, 328 U.S. 408 (1946)	*passim*
Prudential Insurance Co. v. *Hobbs*, 328 U.S. 822 (1946)	*passim*
St. Paul Fire & Marine Insurance Co. v. *Barry*, 438 U.S. 531 (1978)	10
SEC v. *National Securities, Inc.*, 393 U.S. 453 (1969)	8, 9
Shenfield v. *Prather*, 387 F. Supp. 676 (N.D. Miss. 1974)	27
Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945)	15
State Board of Insurance v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962)	21
Udall v. *Tallman*, 380 U.S. 1 (1965)	14
United States v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970)	18
United States v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944)	*passim*
Vance v. *Bradley*, 440 U.S. 93 (1979)	18
Weinberger v. *Weisenfeld*, 420 U.S. 636 (1975)	25
Wheeling Steel Corp. v. *Glander*, 337 U.S. 562 (1949)	19
WHYY, Inc. v. *Glassboro*, 393 U.S. 117 (1968)	19
Williamson v. *Lee Optical Co.*, 348 U.S. 483 (1955)	22
Wong Wing v. *United States*, 163 U.S. 228 (1896)	25
Wong Yang Sung v. *McGrath*, 339 U.S. 33 (1950)	25
Zenith Radio Corp. v. *United States*, 437 U.S. 443 (1978)	14

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS: Page

Commerce Clause, U.S. Const. art. I, § 8, cl. 3 ..... *passim*
Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1 ..... 8, 28
Due Process Clause, U.S. Const. amend. V 18, 25
Equal Protection Clause, U.S. Const. amend. XIV, § 1 ..... *passim*

STATUTES:

Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, § 105(b), 80 Stat. 1563 24
Ind. Code Ann. § 9-7-8-1 (Burns 1980) 27
Internal Revenue Code:

§ 891 23
§ 896(a) 24
§ 896(b) 24
§ 901(c) 25
§ 2014(h) 25

McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. §§ 1011-1015 (1976) ..... *passim*
Md. Rev. & Tax. Code Ann. § 291(a) (1975) 27
Mich. Comp. Laws Ann. § 3.168 (1967) 27
Miss. Code Ann. § 73-3-25 (1975) 27
Neb. Rev. Stat. § 60-305.02 (1978) 27
N.H. Rev. Stat. Ann. § 260:40 (1978) 27
N.J. Rev. Stat. § 39:3-6 (1973) 26
Ohio Rev. Code Ann. § 5729.03, §§ 5725.18(A), (B) (Page 1980) 3
Revenue Act of 1918, Pub. L. No. 254, 40 Stat. 1057 25
W. Va. Code § 11-21-40 (1974) 27

RULES:

Rule 1A:1, Rules of the Supreme Court of Va. (1977) 27

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS:

	Page
90 Cong. Rec. 6548 (1944)	10
6551	10
6554	10, 13
91 Cong. Rec. 479 (1945)	11
482	11, 13
483	11
484	11
485	11
488	12
979	11
1085	11
1087	11, 12
1089	12
1092	12
1396	12
1481	13
1488	12
1489	12
District of Columbia Dept. of Finance and Rev., *Insurance Tax Alternatives* (May 1, 1980)	23
1 Estate Planning: Inheritance and Transfer Tax (P-H) ¶ 854 (1980)	28
H.R. 3270, 78th Cong., 2d Sess. (1944)	11
H.R. 1973, 79th Cong., 1st Sess. (1945)	11
H. Rep. No. 767, 65th Cong., 2d Sess. (1918)	25
H. Rep. No. 873, 78th Cong., 1st Sess. (1943)	13
H. Rep. No. 68, 79th Cong., 1st Sess. (1945)	12
H. Rep. No. 143, 79th Cong., 1st Sess. (1945)	12
H. Rep. No. 1450, 89th Cong., 2d Sess. (1966)	24
Note, *Congressional Consent to Discriminatory State Legislation*, 45 Colum. L. Rev. 927 (1945)	8
Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960)	27
Pelletier, *Insurance Retaliatory Laws*, 39 Notre Dame Law. 243 (1964)	14

TABLE OF AUTHORITIES—Continued

	Page
Pyle, *The Metamorphic Retaliatory Tax Law (What Lies Ahead?)*, 23 Ass'n of Life Insurance Counsel Proc. 857 (1972)	8, 10, 14
Rules for Admission to the Bar in the United States and Territories (West 1979)	27
S. 340, 79th Cong., 1st Sess. (1945)	11
S. Rep. No. 20, 79th Cong., 1st Sess. (1945)	11-12
S. Rep. No. 1707, 89th Cong., 2d Sess. (1966)	24-25
Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968)	27

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This brief in support of appellee is submitted with the written consent of counsel to both parties filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The American Insurance Association, the National Association of Independent Insurers, and The Alliance of American Insurers are national trade associations representing more than 700 insurance companies writing property and casualty insurance throughout the United States, including New York, Ohio and California. State Farm Mutual Automobile Insurance Company, not a member of any of these associations, is the largest property and casualty insurer in the country. In 1979, the companies represented in this brief accounted for $69

billion of direct written premiums for property and casualty insurance—nearly 80 percent of the industry total—and paid state gross premiums taxes possibly totaling as much as $1.5 billion. In addition, in 1979 these companies paid state retaliatory taxes estimated to amount to $23 million out of an industry total of approximately $29 million.

Based on more than one hundred years of experience under a system of taxation which has included retaliatory taxes, the property and casualty insurance industry supports such taxes in the firm belief that they are an effective means of (1) restraining the states from imposing more burdensome or discriminatory forms of taxation, (2) maintaining substantial nationwide uniformity in premium tax rates and (3) thus enhancing the ability of insurance companies to do business on a national basis. Retaliatory taxation has proven effective because state legislatures, forewarned that increases in premiums taxes will result in retaliation against domestic insurers by other states, have proceeded with extreme caution before enacting any such increases.

STATEMENT

With one significant exception, *amici curiae* generally concur in the statement of the case as set forth by the parties in briefs filed previously.

Contrary to what this Court has been told, Ohio *does* discriminate between foreign and domestic insurers. The trial court erroneously concluded that Ohio did not discriminate against California insurance companies during the "pertinent" years from 1965 to 1971. Joint Appendix at 75. This finding may have been the result of a stipulation by counsel for the parties, who actually agreed only that a *prior* case had found that Ohio did not discriminate during the tax years 1959 and 1960. Joint Appendix at 5. In any event, the trial court's "conclusion of law" is contrary to the actual situation existing in Ohio since at least 1933. *See Columbia Fire*

Insurance Co. v. *Tracy*, 133 N.E.2d 661, 662-63 (Ohio Ct. Com. Pl. 1953), *aff'd*, 139 N.E.2d 482 (Ct. App. 1954).

Ohio collects from each *foreign* insurance company a gross premiums tax of 2.5 percent. Ohio Rev. Code Ann. § 5729.03 (Page 1980). *Domestic* companies, on the other hand, are given an alternative of paying a separate franchise tax on the lesser of two bases. One alternative results in a tax exactly equivalent to the 2.5 percent gross premiums tax imposed on foreign insurers. *Id.* § 5725.18(B). The other involves a tax of three-tenths of one percent on the capital and surplus of a domestic insurance company calculated according to a formula set forth in the statute. *Id.* § 5725.18(A). Of course, Ohio domestic insurers will pay this latter tax whenever it results in a lower overall tax burden. It is common knowledge in the industry that this is frequently the case, and that in numerous instances the differential is substantial. Indeed, appellant's Ohio tax returns, on public file in Columbus, reveal that appellant itself has regularly taken advantage of the lower alternative tax.[1] This more favorable treatment is never available to foreign insurers.

For the convenience of the Court, the Ohio tax provisions are reprinted in Appendix A.

SUMMARY OF ARGUMENT

State retaliatory taxation of insurance companies is not a novel form of taxation, or an aberration existing in only one state or region. More than a century old, it exists today in all but three states. Experience has demonstrated that retaliatory taxation is rational, workable and effective, and that it promotes, rather than hinders, the free trade values of the Commerce Clause.

[1] We have lodged with the Clerk of the Court copies of appellant's recent returns that were immediately available from the public file.

Strong concerns of federalism mandate that this system not be overturned by the Court.

I

Congress, and this Court, authorized retaliatory taxation of insurance companies nearly 35 years ago, and nothing that has happened in the intervening years has undermined the validity of those judgments.

Retaliatory taxes were first enacted during a period when the insurance business was not considered a part of interstate commerce. *See Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168 (1868). These were not protectionist taxes, but rather an attempt on the part of the states to encourage sister states to remove existing protectionist barriers. But retaliatory taxes, like all other forms of state insurance taxation, were thrown into doubt by the Court's historic decision in *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944), holding that insurance was subject to Congress' commerce power.

Congress responded immediately to head off the threat that state regulation and taxation of the insurance business would be invalidated or impaired by a wave of Commerce Clause litigation. By its language and structure, the 1945 McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976), indicated that Congress intended to validate *all* kinds of state insurance taxation, including the retaliatory tax system that had been an integral feature of insurance taxation for more than half a century.

The legislative history of the McCarran Act fully confirms this purpose. The bill that eventually became the McCarran Act—prepared with substantial assistance from the insurance commissioners of the states—was introduced specifically to forestall court challenges to existing forms of taxation as burdens on interstate commerce. Passage of the bill was expedited because of Congress' concern that many insurers would refuse to

pay their state taxes. To ensure that its purpose would be fully effectuated, Congress even specified that its own silence was not to be construed as imposing any barrier to continued state taxation of insurance companies. 15 U.S.C. § 1011 (1976).

Nor was Congress' message misunderstood by this Court. In *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946), the Court sustained a South Carolina gross premiums tax levied only against foreign insurance companies. The Court held both that Congress had the power to authorize such discriminatory taxation and that Congress, through the McCarran Act, "clearly put the full weight of its power behind existing and future state legislation." *Id.* at 431. Any remaining doubt whether retaliatory taxes were included in this blanket authorization was dispelled one week later when the Court summarily affirmed a judgment of the Kansas Supreme Court upholding a retaliatory tax *identical* to the California tax challenged in this appeal. *Prudential Insurance Co.* v. *Hobbs*, 328 U.S. 822 (1946). Moreover, shortly after *Benjamin* and *Hobbs* were decided, most of the states that had repealed their retaliatory tax statutes following the Court's decision in *South-Eastern Underwriters* reenacted those statutes. The import of *Benjamin* and *Hobbs* thus was unmistakable. Congress had the power under the Commerce Clause to authorize state retaliatory taxation of insurance companies, and it had fully exercised that power. If this exercise is now to be undone, it is for Congress, and not for this Court, to do so.

II

Appellant's equal protection challenge to retaliatory taxation is as unavailing as its Commerce Clause challenge. Unlike the discriminatory taxes struck down by this Court in the past, retaliatory taxes are not aimed arbitrarily at foreign companies as a group. Nor is their purpose merely to increase state revenues. Rather,

the objective of retaliatory taxes is to obtain reciprocity from other states and thereby to promote uniformity of insurance taxation and the free flow of commerce among the states. As such, these measures are fully consistent with our system of federalism and fully consonant with the requirements of equal protection.

The Equal Protection Clause does not demand of states that their tax systems result in rigid equality of taxation. States are given the widest discretion in fashioning classifications that produce reasonable, workable systems of taxation; a classification will be upheld where any state of facts reasonably may be conceived that will sustain it. The ultimate question is whether the classification chosen bears a reasonable relation to the purpose of the law.

California's manifest purpose is to achieve reciprocity. By levying its retaliatory tax on companies from states with high or discriminatory insurance taxes, California seeks to discourage the imposition of such taxes on its own domestic insurers. The retaliatory taxes in effect in 47 states have kept the gross premiums tax rates in most states between 2 and 2.5 percent. Without retaliation, the property and casualty insurance industry believes these rates would go much higher, and the variations among them would multiply, thereby impeding interstate commerce.

Here, too, Congress has acted in a manner that demonstrates the validity of retaliatory taxation. The U.S. Internal Revenue Code contains five retaliatory tax measures permitting the President to impose a higher tax on aliens and foreign corporations within the United States' jurisdiction based solely on the tax laws of the foreigners' home countries. Congress has thus acted with the same purpose—to promote reciprocity—and the same means—imposition of a higher tax on citizens of the offending jurisdiction—as California and her sister states. Evidently, Congress considered such measures appropriate and rational. Furthermore, many other

forms of state regulation, licensing and taxation depend on similar classifications of noncitizens, and would be undermined by invalidation of California's tax.

Insurance retaliatory tax measures are thus not arbitrary, or irrational, or lacking in any conceivable basis in fact. On the contrary, they are workable and effective, contributing significantly to an integrated system of state insurance taxation that has existed for more than a century. Where Congress and the states have exerted all their power to erect such a system, the Court should be loath to overturn it. No evil here exists that would justify such a far-reaching and destructive judgment.

ARGUMENT

I. STATE RETALIATORY TAXES, DESIGNED TO LOWER BARRIERS TO INTERSTATE COMMERCE, WERE CONGRESSIONALLY AUTHORIZED BY THE McCARRAN-FERGUSON ACT AND CONSTITUTIONALLY SUSTAINED BY THIS COURT ONE YEAR LATER

A. The McCarran Act Authorized the States to Continue Retaliatory Taxation, Notwithstanding That This Court Had Subjected Insurance to the Commerce Clause for the First Time

While appellant characterizes retaliatory insurance taxes as barriers to interstate commerce,[2] they were in fact adopted by the states, not as protectionist devices, but rather to deter or minimize state taxes which themselves were protectionist and impeded commerce across state lines. During the mid-19th century, intense competition within the insurance industry resulted in unduly low premium rates and this, in turn, led to numerous insurance company insolvencies. To protect

[2] The discussion in this brief is limited to the retaliatory tax issue and does not address the separate credit against premium taxes permitted by California for real estate taxes paid on a principal office.

financially threatened domestic insurers, many states enacted legislation imposing heavier taxes upon competing companies domiciled in other states.

Constitutional challenges to these provisions were almost uniformly unsuccessful. In a line of cases beginning with *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168 (1868), the Court held that insurance was not interstate commerce within the meaning of the Commerce Clause, and thus was governed solely by local law.[3]

As a consequence of these and similar decisions,[4] many states concluded that their only effective remedy against protectionist state barriers was retaliation. By 1944, approximately 40 states had enacted retaliatory taxes like the one presently in force in California. Pyle, *The Metamorphic Retaliatory Tax Law (What Lies Ahead?)*, 23 Ass'n of Life Insurance Counsel Proc. 857, 897 (1972) (hereinafter "Pyle"); Note, *Congressional Consent to Discriminatory State Legislation*, 45 Colum. L. Rev. 927, 930 n.15 (1945).

In 1944, the entire relationship between the states and the federal government in the area of insurance regulation and taxation was transformed by the decision in *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944) ("*SEUA*"). By holding that "insurance transactions were subject to federal regulation under the Commerce Clause," *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 458 (1969), *SEUA* effectively overruled the *Paul* v. *Virginia* line of cases.

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[3] *See also* Hooper v. California, 155 U.S. 648 (1895); Noble v. Mitchell, 164 U.S. 367 (1896); New York Life Ins. Co. v. Cravens, 178 U.S. 389 (1900); New York Life Ins. Co. v. Deer Lodge County, 231 U.S. 495 (1913); Bothwell v. Buckbee, Mears Co., 275 U.S. 274 (1927).

[4] *See, e.g.*, Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886) (New York retaliatory tax, comparable to California's present statute, valid under Equal Protection Clause); Paul v. Virginia, *supra* (Privileges and Immunities Clause did not apply to corporate insurer).

The McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. §§ 1011-1015 (1976), passed one year after *SEUA*, was the product of Congress' concern "about the inroads the Court's decision [in *SEUA*] might make on the tradition of state regulation of insurance." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 458 (1969). As this Court remarked shortly after the Act's passage, "[o]bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 429 (1946). This comprehensive Congressional purpose, the statute's plain meaning, its structure, the events leading to its sudden passage, and the legislative debates all lead to the conclusion that the McCarran Act authorized the continuation of retaliatory taxation.

The "starting point in a case involving construction of the McCarran-Ferguson Act . . . is the language of the statute itself." *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 (1979). That language is unequivocal and unqualified. Congress declared that "the *continued* regulation and *taxation* by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011 (1976) (emphasis added). To implement this objective, Congress provided that "[t]he business of insurance, and every person engaged therein, shall be subject to *the laws* of the several States which relate to the regulation or *taxation* of such business." 15 U.S.C. § 1012(a) (1976) (emphasis added).[5]

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[5] Congress' intention to encompass all forms of state taxation within the McCarran Act is also reflected in 15 U.S.C. § 1012(b) (1976), which provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede *any law* enacted by *any State* for the purpose of regulating the business of insurance, *or which imposes a fee or tax upon such business*, unless such Act specifically relates to the business of insurance" (emphasis added).

This statutory language, repeatedly focusing on "taxation" and "regulation," does not comport with the Solicitor General's sug-

On its face, this language makes no distinction between the varying forms of state taxation. The Act certainly does not distinguish between "retaliatory" and "non-retaliatory" statutes or approve of all but those taxes alleged to be "discriminatory." If Congress had intended to limit the forms of taxation authorized by the Act, "it is not unreasonable to assume that it would have made this explict." *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 550 (1978). Appellant thus carries a heavy burden of proof in showing that the plain meaning of the statute is contradicted by its legislative history. *Id.* at 541. Appellant has not and cannot carry this burden.

Early versions of the bills that became the McCarran Act made no mention of taxation. Beginning in mid-1944, however, Congress' predominant concern was that state insurance taxes would be struck down under the Commerce Clause if it failed to act.[6]

This concern was well-founded. Immediately after *SEUA* was handed down, insurers in 24 states brought actions asserting that various forms of insurance taxation discriminated against interstate commerce.[7] At least one of these cases, which reached the Supreme Court in 1946, involved a Kansas retaliatory tax virtually identical to the California statute now under attack.[8] By

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gestion that the primary purpose of the McCarran Act was to grant antitrust immunity to the industry rather than to preserve state tax and regulatory laws. Brief for the United States at 15. Indeed, in Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 217-18 (1979), the Court characterized the "primary concern of Congress" as enactment of "legislation that would ensure that the States would continue to have the ability to tax and regulate the business of insurance"; "the applicability of the antitrust laws to the insurance industry" was only a "secondary concern."

[6] *See* 90 Cong. Rec. 6548, 6551, 6554 (1944).

[7] Pyle, *supra*, at 897.

[8] In re Insurance Tax Cases, 160 Kan. 300, 161 P.2d 726 (1945), *aff'd per curiam sub nom.* Prudential Ins. Co. v. Hobbs, 328 U.S. 822 (1946).

late 1944, Congress was aware of these legal challenges. State tax officials had informed the legislators that numerous foreign insurers (like appellant) were refusing to pay their premium taxes or would pay only under protest.[9]

In response to the pleas of state tax authorities, a new bill, which eventually became the McCarran Act, was introduced to authorize the continuation of all existing forms of state insurance taxation.[10] The bill was a modification "of a measure which was originally drafted by the legislative committee of the National Association of Insurance Commissioners," that is, those state officials who had the most direct interest in maintaining the systems of state taxation. 91 Cong. Rec. 483 (1945) (remarks of Sen. O'Mahoney). *See also* 91 Cong. Rec. 1488 (1945) (remarks of Sen. Barkley).

Proponents of the bill constantly exhorted their colleagues to expedite passage due to the overhanging threat of massive defaults in state tax payments: "[T]here is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the

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[9] In the words of Representative Hancock, "[u]nder [the *SEUA*] decision insurance, if written by a company in more than one State, is, as a matter of law, interstate commerce today . . . . Therefore the taxes imposed on insurance companies in many States may be regarded as burden on interstate commerce and, therefore, unlawful. As a result, many companies are refusing to pay their insurance taxes . . . . Others are paying taxes under protest . . . ." 91 Cong. Rec. 1087 (1945). *See also* 91 Cong. Rec. 479, 482, 484, 485, 979, 1085 (1945).

[10] The bill was originally introduced by Senators McCarran and Ferguson on December 18, 1944, as an amendment to H.R. 3270, 78th Cong., 2d Sess. (1944). It was reintroduced at the outset of the next session of Congress. S. 340, 79th Cong., 1st Sess. (1945). *See also* H.R. 1973, 79th Cong., 1st Sess. (1945).

ground that . . . such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters* case . . . ." S. Rep. No. 20, 79th Cong., 1st Sess. 2 (1945).[11] With other changes not here relevant, the bill was quickly passed by the House on February 23, 1945, and by the Senate on February 27, and was signed by the President on March 9. 91 Cong. Rec. 1396, 1489 (1945); 59 Stat. 34 (1945).

These events amply demonstrate that a principal purpose of the McCarran Act—and the primary reason for the expedited passage of the bill in early 1945, after two years of prolonged debate—was to thwart exactly the type of Commerce Clause challenge to state taxes that this case presents.

The broad purpose underlying the Act confirms this reading of the legislative history. Congress was "extending to the States complete immunity for their State tax laws . . . ." 91 Cong. Rec. 488 (1945) (remarks of Sen. O'Mahoney). Congress "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it . . . ." *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 431 (1946).[12] In light of this comprehensive goal, it would be wrong to attribute to Congress an intention to exclude retaliatory taxes: "Congress must have had full knowledge of the nation-wide existence of state systems of

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[11] *See also* H. Rep. No. 68, 79th Cong., 1st Sess. 2 (1945); H. Rep. No. 143, 79th Cong., 1st Sess. 2 (1945); 91 Cong. Rec. 1089, 1092, 1488 (1945).

[12] The debates are likewise replete with statements that Congress intended to confer on the states the broadest possible discretion: "[T]his bill goes as far as we can in an effort to maintain the rights of the States to tax the insurance business within their respective boundaries." 91 Cong. Rec. 1087 (1945) (remarks of Rep. Hancock).

regulation and taxation; of the fact that they differ greatly in the scope and character of the regulation imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations." *Id.* at 430.[13]

Indeed, Congress took pains to dispel the inference that its silence could imply disapproval of state tax laws. The preamble to the Act expressly declares "that *silence* on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of [the business of insurance] by the several States." 15 U.S.C. § 1011 (1976) (emphasis added). *See also* 91 Cong. Rec. 482 (1945) (remarks of Sen. Radcliffe). Moreover, in those few areas where Congress intended to carve out a limited federal role notwithstanding that the states had occupied the field, it explicitly so provided.[14]

Finally, it is clear that the states, which actively participated in the drafting of the McCarran Act, contemporaneously interpreted it as approving retaliatory taxes. After *SEUA*, 13 or 14 states repealed various forms of retaliatory taxes, apparently on the assumption that they

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[13] Congress was also aware of the major pre-*SEUA* decision upholding retaliatory taxes. It cited with approval the *Philadelphia Fire Ass'n* case sustaining the constitutionality of New York's retaliatory tax, which was virtually identical to the California tax here in issue. *See, e.g.*, H. Rep. No. 873, 78th Cong., 1st Sess. 2 (1943); 90 Cong. Rec. 6554 (1944).

[14] Thus, state laws could be "invalidated, impaired or superseded" by Federal legislation only where Congress specifically undertook to regulate insurance in a subsequent enactment. 15 U.S.C. § 1012(b) (1976). Similarly, the federal antitrust laws became applicable to the "business of insurance" even though "regulated by State law" only where conduct amounted to "boycott, coercion, or intimidation." 15 U.S.C. §§ 1012(b), 1013(b) (1976). *See also* 91 Cong. Rec. 1481 (1945) (remarks of Sen. Ferguson).

had been invalidated by that decision.[15] Within a few years after passage of the McCarran Act, however, most of these states had reenacted their statutes.[16] It is thus evident that the states believed the McCarran Act authorized retaliatory taxation and acted on that belief. Substantial weight should be accorded to this contemporaneous construction of the statute by those charged with administration of the laws to which it gave effect.[17]

B. This Court Has Previously Ruled That the McCarran Act Authorized Retaliatory Taxes and That Congress' Authorization Was Within Its Power Under the Commerce Clause

The precise issue presented here—the McCarran Act's approval of retaliatory insurance taxes—is not a new one. It was considered and decided only one year after passage of the Act.

In *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946), the Court sustained the constitutionality of a South Carolina gross premiums tax laid on foreign insurers but not on domestic companies. In so doing, the Court rejected the very arguments advanced by appellant herein. The Court directly held that Congress had the power under the Commerce Clause to authorize discriminatory state taxes: The "power of Congress over commerce . . . is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade . . . ." 328 U.S. at 434.[18] Nor was

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[15] Pelletier, *Insurance Retaliatory Laws*, 39 Notre Dame Law. 243, 249 (1964); Pyle, *supra*, at 897.

[16] Pyle, *supra*, at 897.

[17] *See* Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933); Udall v. Tallman, 380 U.S. 1, 16 (1965); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978).

[18] The only restriction found to be inherent in the Commerce Clause itself was that Congress could not redefine *intra*state transactions as *inter*state commerce; of course, the status of in-

Congress limited to exercising this power independently, since it may be employed "in conjunction with coordinated action by the states . . . ." *Id.*

On the statutory issue whether the McCarran Act actually authorized discriminatory insurance taxes, the Court found no ambiguity: "[The McCarran Act] necessarily was a determination by Congress that state taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance a burden which it is unable generally to bear or should not bear in the competition with local business." 328 U.S. at 431.[19]

Of more direct significance is the Court's summary affirmance, based upon *Benjamin*, of a Kansas Supreme Court decision sustaining the constitutional validity of three insurance taxes, one of them a retaliatory tax. *Prudential Insurance Co.* v. *Hobbs*, 328 U.S. 822 (1946). While appellant and supporting *amici curiae* seek to escape the holding in *Hobbs*,[20] it is plainly apparent that

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surance as interstate commerce had already been decided in *SEUA*. Similarly, both before and after *Benjamin*, the Court consistently has upheld Congressional enactments turning over to the states authority to regulate transactions in interstate commerce even where such regulation would have been invalid had Congress remained silent. *See, e.g.*, Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S. 311 (1917); Kentucky Whip & Collar Co. v. Illinois Central R.R. Co., 299 U.S. 334 (1937); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 155 n.4 (1942) (dictum); Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945) (dictum); International Shoe Co. v. Washington, 326 U.S. 310, 315 (1945) (dictum); Panhandle Eastern Pipe Line Co. v. Public Service Comm'n, 332 U.S. 507, 521 (1947) (analogizing Natural Gas Act to McCarran Act in upholding state regulation of natural gas sales); Lewis v. BT Investment Managers, Inc., 100 S. Ct. 2009, 2019-2020 (1980) (dictum).

[19] The Court also noted that South Carolina's tax was "not uncommon among the states," *id.*, just as California's retaliatory tax is typical of those in most other states.

[20] *Hobbs* cannot be read for the proposition that retaliatory taxes are constitutional only when the aggregate tax burden borne by foreign insurers is the same as that borne by domestic insurers,

the Kansas statute was *identical* in concept to that of California. It provided "that when the laws of a state under which the insurance company was incorporated require the payment of greater taxes, etc., from insurance companies of other states than is required by the existing laws of this state, then such company shall pay the taxes, etc., which would be required by a company organized in this state in order to do business in such other state." *In re Insurance Tax Cases*, 160 Kan. 300, 303, 161 P.2d 726, 730 (1945).

In short, there is no principled basis in the McCarran Act's legislative history or in the *Benjamin* and *Hobbs* decisions for differentiating the South Carolina and Kansas taxes from the California tax. Indeed, it would be anomalous to strike down retaliatory taxes as discriminatory while approving the truly discriminatory or burdensome taxes against which retaliation is directed. If the California tax is to be invalidated, it can only be by expressly overruling *Benjamin* and *Hobbs*.

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albeit they are taxed under different mechanisms. In *Benjamin*, the Court deliberately refused to base its holding on this type of factual showing, but instead upheld South Carolina's tax under the assumption that it discriminated on its face. 328 U.S. at 428-29. In any event, an alternative ground for the Kansas court's holding in *Hobbs* was that Congress constitutionally could defer to state retaliatory taxation and in fact had chosen to do so through the McCarran Act. This, of course, was the same reasoning employed by this Court in *Benjamin* and it is therefore logical to conclude that *Hobbs* was decided on this same ground.

Additionally, while the Court in *Benjamin* expressed "no opinion concerning the validity" of state provisions "not substantially identical with those of the South Carolina statute," 328 U.S. at 432 n.40, this caveat cannot be extended to nullify *Hobbs*. Obviously, by the very fact of deciding *Hobbs*, the Court *did* reach an opinion on Kansas' retaliatory tax. If it had felt that the *Benjamin* rationale did not apply to retaliatory taxes, it could have affirmed as to Kansas' general premiums tax and reversed or remanded as to the other two Kansas taxes, or heard argument on those taxes. It did neither, but affirmed outright and summarily.

C. Because of the States' and Industry's Substantial Reliance, This Court's Past Decisions Should Not Now Be Overruled and Long-Established Systems of Taxation Upset

This case well illustrates the policies underlying the doctrine of *stare decisis*. For over 34 years, the states have relied on *Benjamin* and *Hobbs* as establishing the validity of retaliatory taxes. The great majority of the states which had repealed retaliatory taxes following *SEUA* reenacted them following passage of the McCarran Act and the Court's decision in *Benjamin*. At present, all but three states have adopted some form of retaliatory taxation, most of them years ago.

To overturn these taxes now would penalize both the states and the industry for their justifiable reliance on the decisions of the highest court in the land.[21] Long-established systems of taxation would be upset, with serious financial consequences involving potentially enormous refunds and the attendant burdens of resolving complicated and stale claims. Reversal undoubtedly would precipitate a wave of litigation similar to that which struck the courts after *SEUA*. Even more than in 1946, the circumstances call for affirmation of state retaliatory taxes.

II. STATE RETALIATORY TAXATION OF INSURANCE COMPANIES IS RATIONAL, NOT ARBITRARY, AND THUS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. The Equal Protection Standard for Measuring a State Tax Classification Is Whether Any State of Facts Reasonably May Be Conceived That Would Justify the Distinction Drawn by the Statute

The Equal Protection Clause of the Fourteenth Amendment has never been construed by this Court as

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[21] *See* Flood v. Kuhn, 407 U.S. 258 (1972).

imposing an "iron rule of equality" from which state tax measures may not depart. *See Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 526 (1959); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937). On the contrary, the Court has always accorded the states, as sovereign bodies, the widest discretion: "Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973) (footnote omitted).

In view of the states' broad latitude, "a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 528 (1959).[22] Moreover, the burden is on the party challenging the state's classification "to negative every conceivable basis which might support it." *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940).[23]

This rule is not altered simply because the statutory classification results in some unequal treatment between foreign and domestic corporations. The "ultimate test of validity is not whether foreign corporations differ from domestic, but whether the differences between them are pertinent to the subject with respect to which the classification is made." *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U.S. 580, 583 (1935). Thus,

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[22] *Accord*, Dandridge v. Williams, 397 U.S. 471, 485 (1970); Madden v. Kentucky, 309 U.S. 83, 88 (1940); Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); *cf.* Vance v. Bradley, 440 U.S. 93, 111 (1979) ("conceivable basis" test applied under equal protection component of Fifth Amendment Due Process Clause); United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 6 (1970) (same).

[23] *Accord*, Vance v. Bradley, 440 U.S. 93, 111 (1979); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

the Court has regularly upheld state statutes differentiating between foreign and domestic companies where the distinction is rationally related to a valid state purpose.[24]

Conversely, in the tax area, decisions condemning unequal state taxation of foreign and domestic corporations have focused on the lack of a rational justification for the particular taxes imposed. *See Hanover Fire Insurance Co.* v. *Harding*, 272 U.S. 494, 508 (1926). Where, for example, the only justification offered is simply the state's desire to obtain more *ad valorem* tax revenue from out-of-state corporations than from its own domestic ones, the Court has not hesitated to strike down such measures.[25]

This case stands on an entirely different footing. The purpose of California's retaliatory tax is not to raise revenue, but to obtain reciprocal treatment.[26] California does not classify foreign insurers as a unitary group, automatically subject to a higher level of taxation than domestic insurers.[27] Rather, out-of-state companies are

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[24] *See, e.g.*, Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 814 (1976); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528-29 (1959); Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580 (1935).

[25] *See, e.g.*, WHYY, Inc. v. Glassboro, 393 U.S. 117, 120 (1968); Wheeling Steel Corp. v. Glander, 337 U.S. 562, 572 (1949).

[26] Appellant asserts that reciprocity is not a legitimate state purpose, citing Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949). That case, however, did not involve reciprocity as that term is properly understood. Ohio imposed its tax on foreign corporations regardless of whether the foreign corporation's home state taxed Ohio corporations in like manner. *See id.* at 573-74. Plainly, Ohio had no purpose to promote commerce or obtain desirable treatment for its corporations doing business elsewhere. Its sole interest was in obtaining greater revenues from non-Ohio companies.

[27] Thus, the Court is not faced with the issue of outright discrimination between foreign and domestic corporations where the taxing state has no intention to seek reciprocity from the foreign corporation's home state. Distinctions dealing with permissible conditions on foreign companies' access to the state are therefore

categorized on the basis of the taxing policies of their home jurisdictions. As a result, the proper test for evaluating California's retaliatory tax is not whether a foreign insurer may in some instances be required to pay a higher tax than a domestic company, but whether California's purpose is legitimate and whether any state of facts may reasonably be conceived to sustain its classification.

B. State Retaliatory Taxation of Insurance Companies Is Based on the Entirely Rational Premise That This System Tends to Promote Uniformity, Minimize Burdens on the Insurance Business, and Foster Interstate Commerce in Insurance

This Court has never "assume[d] that state legislative enactments were adopted arbitrarily or without good reason to further some legitimate policy of the State." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 528 (1959). In light of the adoption of retaliatory taxes in 47 states [28] and the nearly universal state court

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irrelevant, including such factors as whether California's retaliatory tax is a "privilege" tax, whether appellant holds an "unequivocal" license to do business in the state, or whether this tax generally would fall within the rule enunciated in Lincoln National Life Ins. Co. v. Read, 325 U.S. 673 (1945). California's retaliatory tax is valid whether or not a statute imposing a higher tax on all foreign insurers as a group would be permissible under the Equal Protection Clause.

Equally irrelevant is the timing of appellant's entry into the state. A state may change its tax laws relating to foreign corporations at any time, so long as such taxes do not violate the Constitution. *See* Cheney Bros. Co. v. Massachusetts, 246 U.S. 147, 157 (1918).

[28] The retaliatory tax statutes of most states, including California, are sufficiently broad to apply both (1) where the foreign state discriminates between in-state and out-of-state companies and (2) where the foreign state simply imposes on both in-state and out-of-state companies a higher tax than the retaliating state. Even if the Court were to rule that retaliatory taxes are unconstitutional where they apply merely because of a foreign state's higher tax burden, the Court should not strike down these statutes on their

approval of retaliatory measures as constitutionally sound,[29] the Court should accord this tax system a strong presumption of validity, particularly since Congress, in the McCarran Act, threw the full weight of its power behind state insurance taxes.[30]

The purpose of state retaliatory taxation is to promote uniformity in taxation of the national insurance business, and thereby to promote interstate commerce in insurance to the benefit of domestic insurers, the state's economy and its citizens. Since the McCarran Act has removed many of the Commerce Clause restrictions that might otherwise apply to state insurance taxation, the states must necessarily use such tools as are at their disposal to prevent burdensome taxation of domestic insurers when they go forth to do business in other states. Retaliatory tax laws are intended to drive the rates of gross premium taxation toward a common level such that no state imposes a disproportionate burden on the revenues of this essentially interstate business. Considering this purpose, the classification by California and her sister states is not overly broad. The retaliatory tax is levied only where another state imposes a higher tax, and only in an amount equal to the difference.

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face, but should reserve the issue whether retaliatory provisions may be constitutionally applied where a foreign state is found to discriminate against out-of-state insurers.

[29] *See, e.g.*, Commonwealth v. Fireman's Fund Ins. Co., 369 Pa. 560, 87 A.2d 255 (1952); Clay v. Dixie Fire Ins. Co., 168 Ky. 315, 181 S.W. 1123 (1916); Phoenix Ins. Co. v. Welch, 29 Kan. 672 (1883).

[30] While Congress does not, of course, have the authority to transgress constitutional limitations, the Court has taken into account Congressional ideas of policy, especially where "Congress has posited a regime of state regulation on the continuing validity of specific prior decisions." State Board of Ins. v. Todd Shipyards Corp., 370 U.S. 451, 457 (1962). *See also* Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886) (cited in McCarran Act legislative history).

The Court need not agree that this is the best, or the most effective, means of accomplishing the states' goals. Judgments of social and economic policy have long been left to the legislatures, not the courts.[31] Nor need the Court find that the retaliatory tax system has accomplished its goals perfectly in order to uphold its constitutionality. A reasonable classification does not offend against the Equal Protection Clause merely because it does not function with "mathematical nicety." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). The issue is whether state legislators could rationally have believed that such a tax system would accomplish its legitimate goals.

As the chart appearing in Appendix B demonstrates, retaliatory taxation has proven to be effective. Thirty-six states and the District of Columbia impose gross premiums taxes of between 2 and 2.5 percent on out-of-state property and casualty insurers. Approximately half the states have settled on 2 percent as the appropriate level of taxation. Of the ten states imposing a premiums tax greater than 2.5 percent, five offer foreign companies a reduction in the rate if they make investments in the state.

While other explanations can be offered for this substantial degree of uniformity, the property and casualty insurance industry, which pays a substantial portion of the retaliatory taxes imposed, believes that this uniformity is largely attributable to retaliatory taxation and that, in the absence of retaliation, disparities in tax rates would increase dramatically. California's own courts similarly have expressed the view that the purpose of retaliatory taxation has been achieved, observing that the effort "to discourage any state from imposing discriminatory taxes or other burdens upon out-of-state companies . . . seems to have been largely successful."

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[31] *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 484-85 (1970); Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955).

Atlantic Insurance Co. v. *State Board of Equalization*, 255 Cal. App. 2d 1, 62 Cal. Rptr. 784 (Ct. App. 1967), *appeal dismissed and cert. denied*, 390 U.S. 529 (1968). And only a few months ago, the District of Columbia Department of Finance and Revenue confirmed that "the potential retaliation tax payable to other states has been an effective mechanism for restraining the premium tax rate." District of Columbia Dept. of Finance and Rev., *Insurance Tax Alternatives* 3 (May 1, 1980).[32]

C. Congress Has Enacted Retaliatory Tax Measures Classifying Aliens and Foreign Corporations on the Basis of their Home Countries' Laws, Thus Demonstrating That California's Similar Tax is Not Irrational

The U.S. Internal Revenue Code contains no fewer than five retaliatory tax measures closely similar to California's. Each of the five provides that the President may, by proclamation, impose a retaliatory tax on an alien or foreign corporation based on the taxes imposed by the foreign taxpayer's home country. While slight differences exist among them, these provisions collectively employ the same type of classifications and have the same purpose as the California retaliatory tax. They illustrate Congress' judgment that a retaliatory tax may be an effective means of achieving some measure of protection against excessive or unfair taxation. The text of these five measures appears in Appendix C.

Section 891 authorizes the President to double the tax rate (up to a maximum of 80 per cent of gross income) on citizens and corporations of any foreign country subjecting American citizens or corporations to discriminatory or extraterritorial taxes. This provision not only permits higher United States taxes on citizens and corporations of one country than on similarly situated citizens and corporations of another country—based solely

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[32] We have lodged a copy of this document with the Clerk of the Court.

on the laws of the respective countries—but it also authorizes higher taxes on foreigners present in the United States than those imposed on United States citizens. The potential effects of this measure thus parallel those of California's statute.

Section 896 encompasses two measures added to the Code by the Foreign Investors Tax Act of 1966 ("FITA"), Pub. L. No. 89-809, § 105(b), 80 Stat. 1563. Section 896(a) empowers the President to deny FITA tax benefits to residents or corporations of any foreign country subjecting United States citizens or corporations to more burdensome taxes on income received from sources within that country than the United States would impose on United States-source income of that country's residents or corporations. This provision, like California's retaliatory tax, does not require for its application that the foreign jurisdiction discriminate against citizens of the retaliating jurisdiction; a higher level of taxation alone triggers retaliation. Rather than merely duplicating the other country's more burdensome taxes, however, section 896(a) authorizes the President to deny all tax advantages otherwise available under the FITA, thus resulting in retaliation that may be harsher, less harsh, or equivalent to the additional tax burden imposed by the other country.[33]

Section 896(b) was enacted primarily to remedy a perceived deficiency in the operation of section 891. Whereas section 891 authorizes only a doubling of taxes on foreigners, section 896(b) gives the President "authority to counteract discrimination by effecting substantially the same tax on the persons of the discriminating country" as that country imposes on Americans. S. Rep.

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[33] The legislative history shows that this measure was designed to strengthen the government's hand in dealing with "any country which imposes more burdensome taxes on U.S. citizens and corporations than the United States does on nonresident aliens and foreign corporations." H. Rep. No. 1450, 89th Cong., 2d Sess. 34-35 (1966).

No. 1707, 89th Cong., 2d Sess. 42 (1966). This is, of course, the same remedy prescribed by California.

Section 901(c) originated as section 222(a)(3) of the Revenue Act of 1918, Pub. L. No. 254, 40 Stat. 1057, and is thus the oldest of the federal retaliatory measures. In its present form, section 901(c) empowers the President to deny resident aliens the benefits of the tax credit for income, war profits and excess-profits taxes paid to a foreign country unless the alien's home country provides a like credit to American citizens. The objective is to encourage foreign countries to relieve American taxpayers of a double tax burden on foreign income by offering relief from United States taxes to citizens of reciprocating countries.[34] The last provision, section 2014(h), was patterned after section 901(c) and its predecessors. It authorizes denial of the estate tax credit to citizens of foreign countries that deny United States citizens a credit for estate taxes paid in the United States or other countries.

For equal protection purposes, these measures are indistinguishable from California's retaliatory insurance tax. Embodied in the Due Process Clause of the Fifth Amendment is an equal protection principle identical to that applied to the states by the Fourteenth Amendment.[35] Moreover, it has long been settled that the Fifth Amendment, like the Fourteenth, protects foreign nationals who are within the jurisdiction of the United States.[36] A Congressional enactment that failed to satisfy

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[34] *See* Bowring v. Comm'r of Internal Revenue, 27 B.T.A. 449, 452, 456 (1932); H. Rep. No. 767, 65th Cong., 2d Sess. 11 (1918). *See also* Burnet v. Chicago Portrait Co., 285 U.S. 1, 8 n.6 (1932).

[35] Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975); *cf.* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (equal protection concept first applied to Congressional enactment).

[36] Mathews v. Diaz, 426 U.S. 67, 77 (1976); Wong Yang Sung v. McGrath, 339 U.S. 33, 49-51 (1950); Wong Wing v. United States, 163 U.S. 228, 238 (1896).

the conceivable basis test of traditional equal protection analysis thus would not be valid simply because it applied only to aliens.[37]

These federal retaliatory tax measures are justified by no federal interest distinct from the interest asserted by California in this case. In both instances, the jurisdiction imposing retaliation is seeking to promote free trade outside its borders by inducing other jurisdictions to remove burdensome restrictions on domestic citizens or corporations doing business there. If this is a permissible purpose for Congress to entertain, and retaliation a reasonable means to achieve it, why should the same purpose and the same means be denied to the 47 states having retaliatory laws similar to those of the United States?

D. The Constitutionality of Numerous Other State Laws Would Be Called Into Question If This Court Were to Strike Down Retaliatory Taxes

State retaliatory taxes imposed on insurance companies are not the only state laws distinguishing among noncitizens based upon the laws existing in their home states. In fact, the retaliatory/reciprocal approach is widely used.[38]

A number of states, for example, have statutes authorizing retaliation against owners of motor vehicles registered in states imposing more burdensome taxes and fees on vehicles of the retaliating state.[39] Ten states have stat-

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[37] *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 101, 103 (1976).

[38] The varying forms of these statutes should not be assumed to distinguish them for constitutional purposes. Whether the retaliating government imposes a higher tax to match the other jurisdiction's higher tax, or denies a tax credit otherwise available because the foreign state makes no such credit available, the result is the same insofar as the taxpayer is concerned: a greater tax is collected based solely on the laws of the taxpayer's home state. Labeling such systems "reciprocal" or "retaliatory" in no way affects their constitutionality.

[39] Typical of these is New Jersey's Counterpart Fee Act, N.J. Rev. Stat. § 39:3-6 (1973), which was upheld against equal protec-

utes or court rules admitting otherwise qualified attorneys to practice without a bar examination if the attorney is licensed in a state granting the same privilege.[40] Such laws have been upheld under the Equal Protection Clause as rationally related to the state's goal of achieving reciprocal treatment of its attorneys in other states.[41]

Finally, many state death and income tax laws deny to nonresidents the benefits of certain credits, deductions or exemptions otherwise available solely because the nonresidents' home states do not make like benefits available to the taxing state's citizens.[42] That the states could deny such credits to nonresidents altogether has no bearing on the constitutionality of these laws. Even where the government is free to withhold a privilege at will, it may not deny the privilege on an unconstitutional basis.[43] Reciprocal availability of the credit results in

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tion, due process, and Commerce Clause challenges in B&L Motor Freight, Inc. v. Heymann, 120 N.J. Super. 270, 293 A.2d 711 (N.J. Ch. 1972), *aff'd*, 125 N.J. Super. 372, 311 A.2d 184 (App. Div. 1973). *See also* Ind. Code Ann. § 9-7-8-1 (Burns 1980); Mich. Comp. Laws Ann. § 3.168 (1967); Neb. Rev. Stat. § 60-305.02 (1978); N.H. Rev. Stat. Ann. § 260:40 (1978).

[40] *See, e.g.*, Miss. Code Ann. § 73-3-25 (1975); Rule 1A:1, Rules of the Supreme Court of Va. (1977). *See generally* Rules for Admission to the Bar in the United States and Territories (West 1979).

[41] *See, e.g.*, Hawkins v. Moss, 503 F.2d 1171, 1177 (4th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975); Goldsmith v. Pringle, 399 F. Supp. 620, 623-25 (D. Colo. 1975) (three-judge court); Shenfield v. Prather, 387 F. Supp. 676, 689 (N.D. Miss. 1974) (three-judge court); *cf.* In re Griffiths, 413 U.S. 717, 733 (1973) (Burger, C.J., dissenting) (Equal Protection Clause would not foreclose state from admitting to practice only those nationals of countries admitting Americans to practice).

[42] *See, e.g.*, Md. Rev. & Tax. Code Ann. § 291(a) (1975) (income tax credit); W. Va. Code § 11-21-40 (1974) (same).

[43] *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972). *See also* Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

discrimination *between nonresidents*, which cannot occur where the credit is denied outright. For equal protection purposes, the critical question this raises is the same as the issue in this case, namely, whether the classification of noncitizens on the basis of the laws of their home states serves a rational purpose.[44] Distinguishing among noncitizens in this way is constitutional on the same basis as California's retaliatory insurance tax: because the state's purpose—to encourage reciprocity—is a valid and rational one.[45]

E. Equal Protection Does Not Compel Judicial Intrusion Into an Area Where Both Congress and the States Have Validly Exercised Their Legislative Judgment

While we believe that retaliatory taxation has worked remarkably well, this Court need not find that it has been a perfect instrument in order to sustain it. The Equal Protection Clause does not demand perfection. It requires only that the states exercise their taxing power in a manner not arbitrary or without any conceivable basis in fact. While reasonable men might differ on the wisdom and efficacy of retaliatory tax statutes, by no means can it be said that these measures are irrational.

On the contrary, logic, long experience and empirical evidence confirm the validity of the states' legislative judgment that retaliatory taxes are generally workable

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[44] The same is true of death tax exemptions for gifts to foreign charities, granted in 24 states only where the other state reciprocates. *See* 1 Estate Planning: Inheritance and Transfer Tax (P-H) ¶ 854 (1980).

[45] Of course, if the Court upholds California's retaliatory tax on insurance corporations, the states would not necessarily have similarly broad discretion to differentiate among natural persons who are nonresidents. The Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1, imposes an independent constraint on state actions affecting individuals that does not exist for corporations. *See* Austin v. New Hampshire, 420 U.S. 656, 667 (1975) (state retaliation against individuals impermissible).

and effective. It is for this reason that the vast majority of property and casualty insurers—the supposed "victims" of these "discriminatory" measures—support them.

Far from representing an effort by states to discriminate against interstate commerce, retaliatory statutes are essentially equalizing laws. Their aim is to strike a balance between the states' legitimate needs for revenue, and a uniform level of insurance taxation that will not prove stifling to commerce. Retaliatory taxes thus not only meet the requirements of the Equal Protection Clause, but also comport fully with the free trade principles underlying the Commerce Clause and the policy of deference to state regulation embodied in the McCarran Act. In sum, the question here is ultimately one of policy, and its resolution is best left to legislative judgment, free from judicial intrusion.

Insurance retaliatory taxes represent the coordinated action of Congress and the states. They are "therefore reinforced by the exercise of all the power of government residing in our scheme." *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 436 (1946). Where Congress and the states have so combined their powers to enact a coordinated system of taxation, the Court should refrain from interfering absent an evil so "clear and gross" that it plainly exceeds the outermost limits of the Constitution. *Id.* Appellant has utterly failed to demonstrate any such evil.

CONCLUSION

The judgment of the Court of Appeal of California should be affirmed.

Respectfully submitted,

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Appendices

APPENDIX A

OHIO INSURANCE TAX PROVISIONS

Domestic Insurance Companies

5725.18. Annual franchise tax on the privilege of being an insurance company

An annual franchise tax on the privilege of being an insurance company is hereby levied, measured by the smaller of the following bases as applied to a domestic insurance company:

(A) The capital and surplus of a domestic insurance company having capital divided into shares, or the surplus of a domestic insurance company not having capital divided into shares, at the value thereof reported by the company in its annual statement for the preceding year filed with and approved by the superintendent of insurance setting forth the admitted and nonadmitted assets and the liabilities of the company, including in such liabilities:

(1) The reserve and unearned premium liabilities computed as provided by law, the same being the amount of debts of an insurance company because of its outstanding policies in gross;

(2) Amounts set apart for the payment of dividends to policyholders, and all actual liabilities set forth in the annual statement;

(B) Eight and one-third times the gross amount of premiums received by any such domestic insurance company from policies covering risks within this state during the preceding calendar year, after making the deductions prescribed by section 5729.03 of the Revised Code for foreign insurance companies. The objects of such

tax are those declared in section 5725.24 of the Revised Code, to which only the same shall be applied.

5725.19. Rate of franchise tax on domestic insurance companies

In the month of June, annually, the auditor of state shall charge for collection from each domestic insurance company a franchise tax of three-tenths of one percent of the amount determined by the superintendent of insurance pursuant to section 5725.18 of the Revised Code and certified to the auditor of state. In no case shall such tax be less than twenty-five dollars.

Foreign Insurance Companies

5729.03. Computation and collection of tax

If the superintendent of insurance finds the annual statement required by section 5729.02 of the Revised Code to be correct, he shall compute an amount of two and one-half percent of the balance of such gross amount, after deducting such return premiums and considerations received for reinsurance, and charge such amount to such company as a tax upon the business done by it in this state for the period covered by such annual statement; provided, that any insurance policies which were not issued in violation of Title XXXIX of the Revised Code and which were issued prior to April 15, 1967, by a life insurance company organized and operated without profit to any private shareholder or individual, exclusively for the purpose of aiding educational or scientific institutions organized and operated without profit to any private shareholder or individual, are not subject to the tax imposed by this section. All taxes collected pursuant to this section shall be credited to the general revenue fund.

APPENDIX B

Gross Premiums Tax Rates Applicable

to Out-of-State Property and Casualty Insurance Companies *

Less than 2%	2%	2.25 - 2.35%	2.5%	2.75%	3%	More than 3%
Delaware (1.75%)	Arizona	California (2.35%)	Arkansas	Montana (b)	Alaska	Alabama (a) (b) (4%)
Louisiana (b) (1.85%)	Connecticut	Colorado (a) (2.25%)	New Mexico (b)	Virginia	Idaho	Hawaii (4.2824%)
New York (1.2%)	District of Columbia	Georgia (b) (2.25%)	North Carolina		Mississippi	Oklahoma (b) (4%)
Wisconsin (c) (.375%)	Florida (a)	Massachusetts (2.28%)	North Dakota		West Virginia (b)	Texas (b) (3.85%)
	Illinois	Oregon (2.25%)	Ohio			
	Indiana	Utah (2.25%)	South Dakota (a)			
	Iowa		Wyoming (b)			
	Kansas					
	Kentucky					
	Maine					
	Maryland					
	Michigan (d)					
	Minnesota					
	Missouri					
	Nebraska					
	Nevada (a)					
	New Hampshire					
	New Jersey					
	Pennsylvania					
	Rhode Island					
	South Carolina (b)					
	Tennessee					
	Vermont					
	Washington					

(a) Rate or tax reduced if regional or principal home office maintained in state.

(b) Rate or tax reduced for prescribed percentages of investments in state.

(c) Wisconsin charges out-of-state insurers the same rates as their home states charge foreign insurers, subject to a minimum of 3/8 of 1%.

(d) Michigan imposes a 3% tax on fire, marine and strictly auto insurance.

* This chart is based on the statutes of the fifty states and the District of Columbia as compiled in American Insurance Association, State Taxation Manual (December 1980).

APPENDIX C

FEDERAL RETALIATORY TAX PROVISIONS CONTAINED IN THE U.S. INTERNAL REVENUE CODE

SECTION 891

§ 891. Doubling of rates of tax on citizens and corporations of certain foreign countries.

Whenever the President finds that, under the laws of any foreign country, citizens or corporations of the United States are being subjected to discriminatory or extraterritorial taxes, the President shall so proclaim and the rates of tax imposed by sections 1, 3, 11, 802, 821, 831, 852, 871, and 881 shall, for the taxable year during which such proclamation is made and for each taxable year thereafter, be doubled in the case of each citizen and corporation of such foreign country; but the tax at such doubled rate shall be considered as imposed by such sections as the case may be. In no case shall this section operate to increase the taxes imposed by such sections (computed without regard to this section) to an amount in excess of 80 percent of the taxable income of the taxpayer (computed with regard to the deductions allowable under section 151 and under part VIII of subchapter B). Whenever the President finds that the laws of any foreign country with respect to which the President has made a proclamation under the preceding provisions of this section have been modified so that discriminatory and extraterritorial taxes applicable to citizens and corporations of the United States have been removed, he shall so proclaim, and the provisions of this section providing for doubled rates of tax shall not apply to any citizen or corporation of such foreign country with respect to any taxable year beginning after such proclamation is made.

SECTION 896(a)

§ 896. Adjustment of tax on nationals, residents, and corporations of certain foreign countries.

(a) Imposition of more burdensome taxes by foreign country

Whenever the President finds that—

(1) under the laws of any foreign country, considering the tax system of such foreign country, citizens of the United States not residents of such foreign country or domestic corporations are being subjected to more burdensome taxes, on any item of income received by such citizens or corporations from sources within such foreign country, than taxes imposed by the provisions of this subtitle on similar income derived from sources within the United States by residents or corporations of such foreign country,

(2) such foreign country, when requested by the United States to do so, has not acted to revise or reduce such taxes so that they are no more burdensome than taxes imposed by the provisions of this subtitle on similar income derived from sources within the United States by residents or corporations of such foreign country, and

(3) it is in the public interest to apply pre-1967 tax provisions in accordance with the provisions of this subsection to residents or corporations of such foreign country,

the President shall proclaim that the tax on such similar income derived from sources within the United States by residents or corporations of such foreign country shall, for taxable years beginning after such proclamation, be determined under this subtitle without regard to amendments made to this subchapter and chapter 3 on or after the date of enactment of this section.

SECTION 896(b)

(b) Imposition of discriminatory taxes by foreign country

Whenever the President finds that—

(1) under the laws of any foreign country, citizens of the United States or domestic corporations (or any class of such citizens or corporations) are, with respect to any item of income, being subjected to a higher effective rate of tax than are nationals, residents, or corporations of such foreign country (or a similar class of such nationals, residents, or corporations) under similar circumstances;

(2) such foreign country, when requested by the United States to do so, has not acted to eliminate such higher effective rate of tax; and

(3) it is in the public interest to adjust, in accordance with the provisions of this subsection, the effective rate of tax imposed by this subtitle on similar income of nationals, residents, or corporations of such foreign country (or such similar class of such nationals, residents, or corporations),

the President shall proclaim that the tax on similar income of nationals, residents, or corporations of such foreign country (or such similar class of such nationals, residents, or corporations) shall, for taxable years beginning after such proclamation, be adjusted so as to cause the effective rate of tax imposed by this subtitle on such similar income to be substantially equal to the effective rate of tax imposed by such foreign country on such item of income of citizens of the United States or domestic corporations (or such class of citizens or corporations). In implementing a proclamation made under this subsection, the effective rate of tax imposed by this subtitle on an item of income may be adjusted by the disallowance, in whole or in part, of any

deduction, credit, or exemption which would otherwise be allowed with respect to that item of income or by increasing the rate of tax otherwise applicable to that item of income.

SECTION 901(c)

(c) Similar credit required for certain alien residents

Whenever the President finds that—

(1) a foreign country, in imposing income, war profits, and excess profits taxes, does not allow to citizens of the United States residing in such foreign country a credit for any such taxes paid or accrued to the United States or any foreign country, as the case may be, similar to the credit allowed under subsection (b)(3),

(2) such foreign country, when requested by the United States to do so, has not acted to provide such a similar credit to citizens of the United States residing in such foreign country, and

(3) it is in the public interest to allow the credit under subsection (b)(3) to citizens or subjects of such foreign country only if it allows such a similar credit to citizens of the United States residing in such foreign country,

the President shall proclaim that, for taxable years beginning while the proclamation remains in effect, the credit under subsection (b)(3) shall be allowed to citizens or subjects of such foreign country only if such foreign country, in imposing income, war profits, and excess profits taxes, allows to citizens of the United States residing in such foreign country such a similar credit.

SECTION 2014(h)

(h) Similar credit required for certain alien residents

Whenever the President finds that—

(1) a foreign country, in imposing estate, inheritance, legacy, or succession taxes, does not allow to citizens of

the United States resident in such foreign country at the time of death a credit similar to the credit allowed under subsection (a),

(2) such foreign country, when requested by the United States to do so has not acted to provide such a similar credit in the case of citizens of the United States resident in such foreign country at the time of death, and

(3) it is in the public interest to allow the credit under subsection (a) in the case of citizens or subjects of such foreign country only if it allows such a similar credit in the case of citizens of the United States resident in such foreign country at the time of death,

the President shall proclaim that, in the case of citizens or subjects of such foreign country dying while the proclamation remains in effect, the credit under subsection (a) shall be allowed only if such foreign country allows such a similar credit in the case of citizens of the United States resident in such foreign country at the time of death.